IN THE

Supreme Court of the United States,

55

No. ~~470~~, December Term, 1870.

The Trustees of Jefferson College, in Canonsburgh, in the County of Washington, Plaintiffs below and Plaintiffs in Error,

vs.

Washington and Jefferson College.

GEO. W. WOODWARD,
JAMES VEECH,
GEO. SHIRAS, JR.,
BOYD CRUMRINE,
Of Counsel for Plaintiffs in Error.

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In the Supreme Court of the United States,

DECEMBER TERM, 1870.

THE TRUSTEES OF JEFFERSON COLLEGE, IN CANONSBURGH, IN THE COUNTY OF WASHINGTON, *Plaintiffs below and Plaintiffs in error*,
vs.
WASHINGTON AND JEFFERSON COLLEGE.
No. 470.

In error to the Supreme Court of Pennsylvania.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT.

This cause—like the two next succeeding causes (Nos. 471 and 472)—comes up on a writ of error to the Supreme Court of Pennsylvania, to review the decree of that Court sustaining the validity of an Act of Assembly of that State, which the plaintiffs claim is repugnant to the 1st division of the 10th section of the Constitution of the United States, which forbids any State to pass any law impairing the obligation of contracts.

The record brought up shows the case to be as follows:

Aug. 24, 1869, the plaintiffs filed in the Supreme Court of Pennsylvania a bill in equity against the defendants, wherein they set forth—(see printed Tr. of record, pp. 1, 2, 3.)

1. That they were created a body corporate under the name of "The Trustees of Jefferson College in Canonsburgh, in the county of Washington," by an Act of Assembly, approved January 15th, 1802, entitled "An Act for the Establishment of a College at Canonsburgh, in the county of Washington;"—that said College was duly organized, and for more than half a century had been a successful institution of learning, receiving from time to time the bounty of the State and of private persons.

2. That by the bounty thus obtained they had acquired property and funds in value and amount $150,000, of which was a separate fund of $5,000, donated to educate poor and pious young men; that in 1853, they devised and put in operation a plan of endowment, evidenced by certificates of scholarships, issued on payment of specified sums of money to the Corporate Treasury, whereby the holders became entitled to tuition in said College; that some 1,500 of these were issued, of which about 1,200 were yet outstanding, and that many of these were issued to, and held by, residents of Canonsburgh, the seat of the College, and its vicinity, who had bought them on the faith of the agreement that the tuition thereby granted was to be received at that place.

3. That an Act of Assembly was passed on the 4th day of March, 1865, entitled "An Act to unite the Colleges of Jefferson and Washington, in the county of Washington, and to erect the same into one corporation under the name of Washington and Jefferson College," whereby said Jefferson College was to be united with another, called Washington College, at the county seat of Washington county, and the united institution be known by the joint name aforesaid. One of the terms of this union was, that the studies of the Senior, Ju-

nior and Sophomore classes should be pursued at or near Canonsburgh, and those of the Freshman Class and of the Preparatory and Scientific Departments at or near Washington.

4. That the plaintiffs accepted said act, and united with the corporation, known as Washington College, in the new organization by said act provided, and the classes and departments were henceforth located and conducted accordingly.

5. That the defendants, in violation of the plan of union as aforesaid, were about to remove all the college classes, Professors and movable property from Canonsburgh, and dispose of the college lands and buildings there situate, and that the defendants claimed to be authorized so to do by proceedings had under another Act of Assembly, entitled "A Supplement, &c.," to the Act of March 4, 1865, aforesaid, approved February 26th, 1869.

6. That the Act of March 4th, 1865, and its acceptance by the two Colleges named, upon the terms set forth in said act, and the new organization of the Colleges in pursuance thereof, constituted a contract between the plaintiffs, as trustees of the property and funds of Jefferson College, and Washington College; as also with the new organization called Washington and Jefferson College—the plaintiffs averring that but for the provision of the contract of union, as embodied in said act, (that the three highest of the four college classes, with all the college property, should remain at Canonsburgh as heretofore,) they would not have assented to it.

7. That said Act of February 26th, 1869, being in violation of the contract this made, is invalid, and because if carried into effect it will impair the obligation of the contracts with the holders of scholarship certificates aforesaid, and with other donors to the property and funds of Jefferson College.

The *Prayer* of the bill is—

1. That the Act of February 26th, 1869, be adjudged to be null and void, because, impairing the obligations of subsisting contracts, it is repugnant to the 17th section of Article IX, of the Constitution of Pennsylvania, and the 1st division of section X of the Constitution of the United States.

2. That the defendants be enjoined from removing said classes and any of the College property from Canonsburgh, and from, in any wise acting under said act.

3. Other and further relief &c.

ABSTRACT OF ACTS OF ASSEMBLY,

Appended to and made part of Bill.

ACT OF JANUARY 15, 1802, (Record, p. 4.)

Its *title* is "An Act for the establishment of a College *at Canonsburgh*, in the county of Washington, in the Commonwealth of Pennsylvania."

Its *preamble* is "Whereas, the establishment of a College *at Canonsburgh*, in the county of Washington, for the instruction of youth in the learned languages, in the arts and sciences, and in useful literature, would tend to diffuse information and *promote the public good*."

Sect. 1. "That there be erected and hereby is erected and *established in Canonsburgh*, in the county of Washington, a College, &c., under the management, direction and government of a number of trustees, not exceeding twenty-one, &c.

Sect. 2. "Said trustees and their successors shall *forever hereafter be* one body politic and corporate, with *perpetual succession* in deed and in law, to all intents and purposes whatever, by the name, style and title of "The Trustees of Jefferson College *in Canonsburgh*, in the county of Washington." They are given the usual corporate powers—to take and hold lands, moneys, &c., to sue and defend in courts, &c., with all other powers, &c., usual in other Colleges in the United States.

Sect. 3, provides for meetings of the trustees "at the town of Canonsburgh," for making by-laws and ordinances for the government of the College, appointing principal and professors, &c., and careing for the corporate property.

Sect. 4, provides for the College faculty and its powers.

Sect. 5, provides for the succession in the trustees, how misnomers in gifts or grants by deeds, or in devises or bequests, shall be treated; adding,

"And the constitution of the said College herein and hereby declared and established, shall be and remain the inviolable constitution of the said College forever, and the same shall not be altered or alterable by any ordinance or law of the said trustees, nor in any other manner than by an Act of the Legislature of this Commonwealth."

Sections 6, 7 and 8 are unimportant here.

ACT OF MARCH 4, 1865. (Record, p. 7.)

Its *title* is "An Act to unite the Colleges of Jefferson and Washington, in the county of Washington, and to erect the same into one corporation, under the name of Washington and Jefferson College."

Its *preamble* recites that "the trustees of those Colleges (Jefferson and Washington) *have agreed upon a union* thereof, and have besought this General Assembly to *give thereto* the sanction and aid of a legislative enactment."

Sect. 1, unites said two Colleges into one corporation by the name aforesaid.

Sect. 2, vests all the property and funds of each in the new corporation, "and all the several liabilities of said two Colleges or corporations, by either of them suffered or created, including the scholarships heretofore granted by, and now obligatory upon each of them, are hereby imposed upon and declared to be assumed by the corporation hereby created, which shall discharge and perform the same without diminution or abatement."

Sect. 3, declares the objects of the corporation.

Sections 4 to 9, provide for how the trustees are to be selected and continued, and prescribes their powers and duties.

Sect. 10, directs that there shall be four periods or classes of study, of a year each, denominated the Freshman, Sophomore, Junior and Senior classes.

Sect. 11, creates two additional departments of study, the Scientific and Preparatory; the first to qualify students for business avocations, the second for admission to the first, or to the Freshman class of the College.

Sect. 12, provides prospectively for an agricultural department.

Sect. 13, declares "that the studies of the Senior, Junior and Sophomore classes shall be pursued at or near Canonsburgh, in the county of Washington, and those of the Freshman class and of the Preparatory, Scientific and Agricultural departments at or near Washington, in said county," and provides for how the income of endowment funds shall be apportioned, &c.

Sect. 14, commits the instruction and government of the three higher classes named, to the President and Professors of those classes, and the instruction and gov ernment of the Freshman class and the departments, to the Vice President and Professors, or instructors of their appropriate studies, &c.

Sections 15, 16 and 17 are unimportant here.

Sect. 18. "That from and after the organization of the corporation hereby created, as herein provided, the Colleges of Jefferson and Washington, named in the first section of the act, shall be dissolved, except so far as may be found necessary to enable them to close up their business affairs and to perfect the transfer of their property and rights to the corporation by this act created."

ACT OF FEBUARY 26, 1869. (Record, p. 11.)

It is entitled "*a supplement*" to the Act of March 4, 1865.

Sect. 1. "That as soon as the necessary preliminary arrangements can be made and suitable buildings pro-

vided, the *several departments* of Washington and Jefferson College shall be closely united, and located either at Canonsburgh, Washington, or some other suitable place within this Commonwealth, to be selected and fixed in the manner hereinafter specified."

Sect. 2. "The location of the College shall be determined by the Board of Trustees by a vote of not less than two-thirds, &c., if they can agree, and if they cannot agree within sixty days after the passage of this act, the question of location shall be referred to a commission of five gentlemen." Then, after prescribing the mode of procedure, it directs that they "shall report to the Board of Trustees in writing, where, in their judgment, the united College shall be located, and thereupon the Board of Trustees shall proceed, with as little delay as possible, to carry into effect their recommendation."

Sect. 3. "The commission, if resorted to, shall be chosen by the Board of Trustees," by a two-thirds vote, &c.

Sect. 4 is unimportant.

Sect. 5, provides for an "academy, normal school or other institution of lower grade than a college," to be given by the trustees to the unsuccessful one of the two places named, or to both, if the College is taken "elsewhere," with some real or personal property of the College for the use of such academy, &c.

Sect. 6. "It shall be lawful for any incorporated college or institution of learning within this Commonwealth to unite with Washington and Jefferson College, and consolidate their property and funds for educational purposes, on such terms and conditions as may be agreed upon."

Appended to the bill (Record, p. 13), was *Form of Scholarship Certificates*, also *Plan of Endowment*, referred to in the certificates. (This plan is omitted in the printed record of this case, but is found in record of No. 472, page 14.)

These set forth that (A. B.) having paid ($25 for a *single*, $50 for a *family*, $100 for a 30 *years*, $400 for a *perpetual*, or $1,250 for a perpetual, with *boarding and room rent*,) is entitled to (the specified) scholarship, including a full course of tuition in Jefferson College, in Canonsburgh, in the county of Washington. Dated at Canonsburgh, with corporate seal and signature of President and Secretary.

The defendants responded to the bill by *Plea* and *Answer*.

The *plea* (Record, p. 13) sets up the dissolution and death of the plaintiffs, by the Act of 1865, and its acceptance and the organization of Washington and Jefferson College, as a bar to the bill.

The plaintiffs *replied* to this plea (Record, p. 23) by denying that, for the purposes of their bill and the relief therein prayed, they were dissolved or dead.

The *answer* (Record, p. 14) admits the matters set forth in the *first* section of the bill, also those in the second, with qualification as to value of property and specific purposes of donations. They admit *form* of scholarship certificates and sales to residents of Canonsburgh and vicinity, but make no admissions as to motives or inducements to buy them, and deny that thereby the holders were entitled to tuition at Canonsburgh only.

The allegations in the 3d, 4th and 5th sections of the bill, are admitted, with correctness of copies of the Acts of Assembly appended.

It is then asserted that the Act of 1865 was accepted by the trustees of Jefferson and of Washington Colleges, and the union effected under it, and that the Act of 1869 was accepted by "Washington and Jefferson College," on April 20, 1869, and that on that day, by a two-thirds vote of the trustees thereof, the College was fixed and located *at Washington*.

The answer then asserts that the trustees of Washington and Jefferson College, on June 9, 1869, "resolved to *bring together at Washington all the College classes*," and that then and "at their subsequent meeting on Aug. 4, 1869, they made appropriate and complete arrangements for the organization and conduct of said institution, and the instruction and discipline *of all the College classes at Washington*, and that they made *no provision whatever* for the conduct of any department of the said College at Canonsburgh thereafter." They deny having yet removed any of the College property from Canonsburgh, or disposed of the *several College* buildings there, but say that they "*intend* to dispose of and devote the same in strict conformity with the Act of 1869, whenever they may lawfully do so."

They deny the allegations and conclusions in the 6th and 7th sections of the bill, as to the Act of 1865 and the scholarships forming contracts, the latter performable at Canonsburgh, and that the Act of 1869 is invalid and unconstitutional, &c.

The answer then (Record, pp. 15–23) goes into a history of the two old Colleges and of the efforts and proceedings which resulted in the union of 1865, asserting, *inter alia*, that "*the* TWO BOARDS *besought the General Assembly for the passage of the Act of March* 4, 1865," but that the Act of 1869 was procured to be enacted only by the trustees of "Washington and Jefferson College."

It is nowhere asserted that any of the holders of scholarships had any agency whatever in promoting the

union, or that they ever knew of or accepted tuition under it, or that any of them or any of the plaintiffs had any agency in procuring the Act of 1869.

The answer further shows (Record, pp. 16 and 22) that the draft of the Act of 1869, almost in *hæc verba*, was prepared and first adopted by the trustees of Washington and Jefferson College, who sent a committee to the Legislature to *procure* its passage.

The cause was set for hearing on bill and answer and plea and replication thereto, at the November Term, 1869, of the Supreme Court of Pennsylvania, and was heard in connection with the two other cases now in *this* Court (Nos. 471 and 472), the *decrees dismissing the bills* being pronounced in January, 1870, whereto this and the other two writs of error were sued.

The *opinion* and *decrees* of the Court below were by the Chief Justice, and are found on pages 24–29 of the printed record of this cause.

The *error* assigned and complained of here, is to the decree sustaining defendants' plea and dismissing plaintiffs' bill and denying its prayer, thereby as plaintiffs claim, sustaining the Act of 1869, which empowers defendants to remove the entire College from Canonsburgh, in violation of the contract between plaintiffs and Washington College, and between plaintiffs and defendants, as expressed in the Act of 1865, and in violation of the rights of the scholarship holders and other donors, whom the plaintiffs claim to represent, to have the College and tuition at Canonsburgh.

ASSIGNMENT OF ERRORS.

The said plaintiffs come and say, there was manifest error by the Supreme Court of the State of Pennsylvania,

1. In refusing to grant the relief sought by the *first* prayer of the bill, viz.:

"That the said Act of February 26th, 1869, be declared null and void, in providing for the removal of said College from Canonsburgh in the county of Washington, because such removal will impair subsisting contracts; and said Act is therefore repugnant to the 19th section of the 9th Article of the Constitution of Pennsylvania, and to the 1st division of the 10th section of the Constitution of the United States.

2. In refusing to grant the relief sought by the *second* prayer of the bill, viz,:

"That now by a preliminary, and hereafter by a perpetual, injunction, the said defendants be enjoined and restrained from removing the College, and the Senior, Junior and Sophomore classes, from Canonsburgh, and from in any wise accepting, or acting under the said Act of February 26th, 1869."

3. In decreeing that the plaintiffs' bill be dismissed with costs.

JAS. VEECH,
Of Counsel for Plffs. in Error.

ARGUMENT.

I. As to the defendants' *Plea*—that plaintiffs are, by the Act of 1865, dissolved and dead, and therefore cannot be heard on a bill filed in equity: —

To this plea, we *replied* (record, p. 23.) that, for the purposes of this bill and the relief therein sought, we were neither dissolved nor dead.

The State Court, without considering the special question raised by this bill—the *contract* entered into between the two old Colleges, and between them, severally, and the united College, embodied in the Act of 1865, which all three accepted—sustained this plea, and upon that ground alone dismissed the bill. (Record, p. 27, "2.")

We might notice, in limine, the absence of any *express* dissolution of the *Corporation*, plaintiffs, by the Act of 1865. At most it is only by implication.

That Act (Sec. 1,) *unites* the two corporations therein named into one, to be known by the name of both, and be governed by trustees chosen by both—fifteen by each. (Sec. 4.)

It is only the *College* at each place that is dissolved, not the *Corporation* by which it was governed.

True, the 2d section of the Act gives all the property and funds of both to the united corporation. But a *corporation* may exist without property.

All that is said in the Act about dissolution is in the 18th or last section—(record, p. 10,)—"that from and after the organization of the corporation hereby created, as herein provided, the *Colleges* of Jefferson and Washington, named in the first section of this Act, shall be dissolved, *except* so far as may be found necessary to en-

able them to close up their business affairs, and to perfect the transfer of their property and rights to the corporation by this Act created."

The pleadings admit the due organization of the united or new corporation, but they nowhere show or allege that the "business affairs" of the plaintiffs have been "closed up," or any transfer made of their property and rights, other than what the 2d section of the Act makes. And we may well say that the subject matter of this bill is a business affair not yet closed up, for which purpose we are yet alive.

But we stand not alone upon this, and are content to assume, for the present, that by the *Colleges* the Legislature meant the *Corporations*.

II. We are not required—it may not be proper—to consider or discuss, here, the reasonings of the learned State Court, upon this case. We must be allowed, however, to do it the justice to say that it entirely overlooked the *gist* and *gravamen* of the plaintiffs' complaint. In the 2d and 3d paragraphs of the *Opinion* it states the question raised by *this* bill, as well as that raised by the Bill (No. 472) filed by the scholarship holders, to be "whether the contract of scholarships * * * does not interpose a constitutional barrier to any legislative grant of authority to the Trustees of the College to surrender its former charter, and accept a *new one, by which* the College was eventually removed from Canonsburgh to Washington, in the same county."

This may pass for a statement of the question raised in the Bill in the case No. 472. But *this* bill raises a distinct question; as will be seen by reference to the 3d, 4th, 5th, 6th and 7th paragraphs of the bill (record, pp. 2 and 3), the substance of which is, that it being one of the provisions of the Act of 1865 (Sections 13 and 14—Record, p. 10,) that the studies of the Senior,

Junior and Sophomore classes of the College shall be pursued at or near Canonsburgh, with the president and professors to instruct and govern them there; and those of the Freshmen class and the three newly created departments, at or near Washington; that Act, and its acceptance by all the parties, constituted a *contract*, on the faith of which it was entered into and accepted by the Trustees of Jefferson College, "but for which they would not have entered into the said contract;" and in that the Act of 1869 authorizes the defendants, one of the contracting parties, without plaintiffs' consent, to violate the contract thus formed, that Act (of 1869) is repugnant to the constitutional prohibitions of the State and of the United States. And the *prayer* of the bill conforms to this assertion of grievance.

It does not detract from the force and distinctness of these features of *this* bill, that it unites them to the further ground for claiming the legislation of 1869 to be unconstitutional, because it impairs also the obligations of the scholarship contracts.

This superadded feature of the case is specially considered in the case (No. 472) to which it more appropriately belongs. We will here consider only the distinct and special question of *this* case.

III. That the Act of 1865 constituted, or embodied, a *contract* between the two old Colleges, sanctioned and aided by that legislative enactment, and made to be of binding efficacy by the acceptance of all its provisions by all the parties, old and new, is most manifest—

1. From the second division of the *Preamble* to the Act, which sets forth that for "good and sufficient considerations the Trustees of those Colleges *have agreed upon an union* thereof, and have besought this General Assembly to give thereto the sanction and aid of a legislative enactment."

2. From the *Bill*, which distinctly avers such a contract, as already shown by reference to its complaints and prayers.

3. From the defendants' *Answer*, which, throughout, admits the Act of 1865 and its acceptance by all parties, and especially from its statement, in the first paragraph of the 8th division (Record, p. 15) which declares that the "*two boards* [of the old Colleges] *besought* the General Assembly for the passage of the Act of March 4, 1865," and "duly accepted" it.

The general denial, in the answer, of the "allegations and conclusions" of the 6th and 7th paragraphs of the Bill, in no wise impairs these evidences of the *fact* that such a contract was thus made.

This Act of 1865 not merely "authorized"—as the learned Chief Justice of the State Court reads it—the united College to "provide for the instruction" of the three highest College classes at Canonsburgh. It was imperative—"shall" is the word.

IV. Assuming now, as we think we may safely do, that here was a contract, entered into by parties whom the defendants assert and confess were competent to contract to that extent, it has, confessedly, been not merely "impaired," but utterly broken by the defendants, in that, as they unhesitatingly and with commendable candor assert in their *Answer* (second paragraph of division 5—Record, pp 14-15), "The Board of Trustees of Washington and Jefferson College, at their meeting, on the 9th day of June, 1869, resolved to bring together at Washington, *all* the College classes, in pursuance of the Act of February 26, 1869, and the previous action of the Board locating the institution there. That, accordingly, at that meeting, and at their subsequent meeting on August 4, 1869, they made appropriate and complete arrangements for the organization and conduct of the said Institution

and the instruction and discipline of *all the College classes at Washington*; and that they made *no provision whatever* for the conduct of *any* department of the said College *at Canonsburgh* thereafter."

This unequivocal repudiation of the contract of 1865, they claim they have perpetrated under authority so to do given them by the Act of 1869, and in that that Act does purport to give them such authority, we claim here that it is a forbidden exercise of legislative functions, and therefore a nullity, and hence no justification for the defendants' violation of their solemn contract.

The defendants shun this aspect of the case, and say—it is not we who have broken this covenant, but the Legislature; under the reserved right to "alter, revoke or annul" contained in Sec. 26, Art. 1, of the State Constitution.

We reply—No: the Legislature has not done that thing. It has not, by the Act of 1869, under which you justify, exercised, or pretended to exercise its reserved powers. It has not said that "in their opinion" the Act of 1865 in any of its provisions, was "injurious to the citizens of the Commonwealth," nor has *it* made the change complained of. It has merely said—(as defendants are careful to set forth in their *Answer* [Record, pp. 21–22] was the fact) you have prepared and sent down to us a project of an Act to authorize *you* to break your contract, and we, enacting your project, have said *you* may do it, "if you can agree," if not, you may choose men to agree for you;—and defendants now say they did agree to do it, and have done it. This is all that is in it, "no more, no less."

This view of the case puts out of view all question about reserved powers to repeal, alter or amend. There were no reservations in the contract of 1865 between the corporations who were the parties to it, and the Legislature has not asserted or exercised any of the reserved powers of the State Constitution.

We also put aside for the present—challenged, but not tried—the question of the power of a State, by a general reservation of right to "alter, annul or amend" legislative contracts, to evade the inhibition of the 10th section of the Constitution of the United States.

But we do say, that to sustain legislation such as this Act of 1869, it must at least appear that it was enacted in pursuance of that reserved power, either in express terms, or by necessary implication. The reserved power can only be exercised for cause—as being "injurious to the citizens of the Commonwealth;" and without claiming that this must be ascertained by a judicial, or quasi-judicial investigation, in all cases, yet it must somehow appear to have been determined by the Legislature that in its "opinion" the altered Act was "injurious." The power reserved is not an unlimited one. It is to be exercised "in such manner, however, that no injustice be done to the corporators." It must at least have a *manner* about it.

In the case of *The Boston & Lowell R. R. Co. vs. The Salem & Lowell R. R. Co.*, 2 Gray, 1, where the question was, whether or not certain legislation of Massachusetts was a constitutional exercise of the power of eminent domain, Shaw, Ch. J. (pp. 36 37), says: "The characteristics of such an act of appropriation are known and well understood. It must *appear* that the government *intended* to exercise this high sovereign right, by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting such intent." Again, he says: "In general, therefore, when any act seems to confer an authority on another to take property, and the grant is not clear and explicit, and no compensation is provided by it for the owner, or party whose rights are injuriously affected, the law will conclude that it was not the intent of the Legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or exercise the

power given, *on first obtaining the consent of those thus affected.*"

The application of this most wise and just principle to our case is too obvious to require comment.

"No injustice shall be done to the corporators." What does this mean, in such cases as this? If this graft of 1857 upon the Constitution of Pennsylvania was intended for any other than *moneyed* or *stock* corporations, who, in its application to eleemosynary corporations, are the "corporators?" Surely not the *Trustees* only—the mere custodians, or almoners of the benefactions of the *donors*. It is of *these* that justice or injustice can, in such cases, be predicated. Much more so, when, as here, they are *contractors* holding obligations which these Trustees are bound to perform.

These Trustees of the Corporation, defendants, were, of all others, the most disqualified to exercise, "if they could agree," this delegated power of removal, involving a breach of contract.

And if, instead of committing to them this constitutional power, unreservedly, the Act of 1869 had said—this change in the agreed terms of union upon the faith of which you came into being, may be made upon your having obtained the consent of those to be affected by it, the Trustees of Jefferson College and those whose funds they held, and with whom they had subsisting contracts—there would have been at least a show of providing against "injustice to the corporators." If the defendants, instead of parading in their Answer and its appendages the doings of "joint Alumni," and of their own Trustees, had made some array, even of one, of the holders of scholarships, or had even alleged that it was done with the assent of the Trustees of Jefferson College, their act and action would have had some color of right and constitutionality. Without these, the whole proceeding, act and action, must be deemed irremediably void.

V. Ever since the case of *Dartmouth College vs. Woodward*, 4 Wheaton, 518, decided in 1819, it has been held, in every well considered case in the Federal and State Courts, that Colleges and other institutions of learning in this country, whose funds have been derived from gratuitous benefactions, are of the class of corporations known as eleemosynary, as contradistinguished from mere private, municipal, or moneyed corporations. It would be unpardonably presumptuous here to point out the distinctions. We submit, therefore, that it was a very distorted view of these cases to term the union of 1865, and the acceptance by the Trustees of Jefferson College of the Act of 1865, a *surrender* of its franchises; and that the *only parties* to the contract of the Charter of 1802 were the Trustees of the Legislature. But the learned Chief Justice of the State Court concedes that there are *exceptions* to the right of a private corporation to surrender its franchises. He is right. There are many such. They include all those wherein the persons assuming to make the surrender are mere custodians of the rights of others, or are clothed with power to manage and preserve, *but not to destroy*. An apposite illustration of this distinction is found in the case of *Ward vs. The Society of Attorneys of London*, in 1 Collyer's (Eng. Ch.) Rep., 370, where the Vice Chancellor (Sir Lancelot Shadwell) enjoined the defendants from consummating a surrender, even where the Managing Committee, and all of over 1,200 stockholders, except 21, had expressly agreed to it. The same principle has been ruled by the Supreme Court of Pennsylvania, in *Lauman vs. The Lebanon Valley R. R. Co.*, 6 Casey, 62, and has become an elementary rule in the law of corporations.

By the original Act of 1802, chartering the plaintiffs (Sec. 5, Record, p. 6), it was provided that the "Constitution of the said College" thereby declared, should be "inviolable," and should not be "altered or alterable by

any law or ordinance of the Trustees," but only by an Act of the Legislature. Hence, when, in 1865, the Trustees had "agreed upon a union" with Washington College, thereby making some *alterations* in its *Constitution*, it became necessary to *beseech* the Legislature to "give thereto its *sanction* and *aid*."

These words, *sanction* and *aid*, imply not an original exercise of power by the sovereign will of the Legislature, but merely an *approval* of something already done, and a grant of the *aid* necessary to render what has been done legal and effective. It is merely saying, you say to us, you have made a *contract* changing, in some degree, your *Constitution*, which, without our consent, would be ineffective; and you and the other contracting party have besought us to *sanction* it, and give it the *aid* of our approval, which we now do in the only way we can, viz., by a "legislative enactment."

"If," says the worthy Ch. J., "any body ever did dispute the right of a corporation to surrender its franchises, of its own mere motion, it is not likely that such a contest about the question could be long maintained where both parties, the State and the Corporation, the grantor and grantee, consent to it, absolutely *or upon condition*." Just so—"consent to it *upon condition*." And what if, as here, the condition be broken? Is there no relief—no remedy? Is the party, be he trustee or *cestui que trust*, in whose favor, or for whose protection the condition is made, to be forever dumb and powerless? In such cases, does not a surrender upon condition imply a *contract*, almost *ex vi termini?* And if a State Legislature, without the consent of that party, or any provision for assent, assumes to convert a conditional into an absolute surrender, is it not an enforcement of a contract, as much forbidden as would be a law discharging B, forever, from his debt to A, because A had consented to release it upon condition that B would maintain him for life, which he refused to do?

These plaintiffs solemnly aver, in their Bill (¶ 6, Record, p. 3), that, but for the provision in the contract of union, as embodied in the Act of 1865, that the "College buildings and property, and the Senior, Junior and Sophomore Classes *should* [*shall* is the requirement of the Act] remain at Canonsburgh"—the ancient seat of the first College of the West—"they would not have entered into the contract." And who can doubt the truth of this averment? This imperative requirement was therefore the *condition* of their assent to the union.

This case (No. 470) concedes that the Trustees of Jefferson College had power to enter into the contract of 1865, and seeks only a decree for its enforcement. This brings us to consider—

VI. Can the redress sought be obtained under a bill filed in the corporate name of the old College at Canonsburgh?

This brings us back to the defendant's *Plea*, which the State Court sustained.

If we are right in claiming that the union agreed upon in 1865, and sanctioned by the "legislative enactment" of March 4, 1865, was a contract, not merely between the State and the new Corporation, but between the two old Colleges, and between them severally and the new one, then it follows that the plaintiffs were a contracting party, who, by themselves, or their representatives, or those whom they represent, must be parties to any proceeding to vindicate a violation of the contract.

If, as is most clearly true, the plaintiffs were but *Trustees* of the College funds and property, and their *cestui que trusts*, the real beneficiaries, cannot, from any cause, appear in a Court of Equity to assert their violated rights, it would seem that they must, *ex necessitate rei*, be heard through and by these Trustees.

Says Ch. J. Marshall, in *Dartmouth College vs. Wood-*

ward, 4 Wheaton, 630: "But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the Charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that these arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever, may not assert all the rights which they possessed while in being; whether, if they be without personal representatives who may feel injured by a violation of the contract, the Trustees be not so completely their representatives in the eye of the law, as to stand in their place, not only as respects the government of the College, but also as respects the maintenance of the College Charter."

Again, page 645, he says: "In every literary and charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in Trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the Trustees."

Mumma vs. The Potomac Company, 8 Peters, 281, is relied upon, to put us effectually out of existence, and to sustain the position that this broken contract must go "unwhipped of justice," for want of a party to complain. At law it may do so, but not in equity. And for that it may do so at law, the stronger is the reason why, in equity, it cannot.

That case was one of a Stock Company, and there had been an entire surrender by the Company—Stockholders and Directors—of the property and franchises, consummated by a conveyance to the Chesapeake and Ohio Canal Company, And in the Act authorizing the surrender, the rights of creditors to resort to its funds and property was expressly reserved. And the learned counsel for the Company concedes, in *arguendo*, that the property of the defunct Corporation could be followed—which could not be in law, but in equity.

There being there a distinct, living party to sue in equity, he would be the plaintiff. While *here*, the parties to complain must assert their rights as *against* a living Corporation through the Trustees, plaintiffs. If not so, then at last we have found a case of wrong without a remedy, and the time-honored prerogative of Courts of Equity, never to permit the right to fail for lack of a party through whom to assert it, must be abdicated.

VII. The defendants have loaded down their answers in these causes, with exhibits of *their own action*, and that of some meeting of *Alumni*, having in view a consolidation of the united College at some one place; and their Act of 1869 authorized them to make it a *peripatetic* school—to take it to "Washington, Canonsburgh, or *elsewhere* in this Commonwealth;" but always and everywhere, so that, say they, as by the Act of 1865 they were bound, all the obligations of the old Colleges shall be discharged and performed, "without diminution or abatement." And "is it not a little thing," say they, "that we take the boys to another town, only seven miles away? True, we obligated ourselves to give them three classes of their education at Canonsburgh; but who can complain if we give it all to them elsewhere?" The ready reply to all this is, we stand upon our contract.

"In short, does not every alteration of a contract however unimportant, even though it be manifestly for the interest of the party objecting to it, impair its obligation? If the assent of all the parties to be bound by a contract be of its essence, how is it possible that a new contract, substituted for, or engrafted on another, without such assent, should not violate the old Charter?" Washiugton, J., in *Dartmouth College vs. Woodward*, 4 Wheaton, 662–3.

It is conceded in and by the State Court, that the 10th section of Article I. of the Constitution of the United States, would require that, in altering or repealing Charters of incorporation, contracts should be left intact, and legal remedies preserved. And it is claimed that the legislation and action of the defendants, in pursuance of it, of which we complain, impairs no contract which they were bound to respect. We think we have shown that it does, materially, vitally. The remedy for that impairment and violation is that which we now here seek, viz., a *decree*, requiring defendants to restore the three highest College Classes to Canonsburgh, and there give them instruction and discipline, as in 1865 they agreed to do, and to allow no alienation, or removal from that place, of the College property there.

JAS. VEECH,
GEO. W. WOODWARD,
GEO. SHIRAS, JR.

Cons. pro Quer.

Supreme Court United States.

DECEMBER TERM, 1871.

THE TRUSTEES OF JEFFERSON COLLEGE, &c., Plaintiffs in Error,
vs.
WASHINGTON AND JEFFERSON COLLEGE, Defendant in Error. — *No. 55.*

FRANCIS I. COLLIER ET AL., Plaintiffs in Error,
vs.
Washington and Jefferson College, Defendant in Error. — *No. 56.*

DAVID C. HUSTON ET AL., Plaintiffs in Error,
vs.
Washington and Jefferson College, Defendant in Error. — *No. 57.*

BRIEF FOR DEFENDANT IN ERROR.

JOHN A. WILLS,
For Defendant in Error.

WASHINGTON CITY:
McGILL & WITHEROW, PRINTERS AND STEREOTYPERS.
1871.

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DAVID C. HUSTON ET AL., Plaintiffs in Error
vs.
WASHINGTON AND JEFFERSON COLLEGE, Defendant in Error. } No. 57.

BRIEF FOR DEFENDANT IN ERROR.

These three writs of error have been brought under the 25th section of the judiciary act, to review the judgments of the Supreme Court of Pennsylvania, dismissing in each of these cases the bills of the complainants.

The cases were heard in that court on the bills and answers, and their accompanying exhibits. They were argued together, and were disposed of together, for the reasons stated in the opinion of the court, which is embodied in each of the records, and is an able vindication of the correctness of its judgments.

We shall follow the example of that court by considering the three cases in one brief.

The history of the events which led to the legislation which is now the subject of review, is fully given in the concluding sections of the answers in each of the cases. The attention of the court is respectfully called to that history, as it is the best explanation which can be given, and furnishes in itself the fullest justification for what the Legislature of Pennsylvania has done.

The general question in all three of these cases is, the *constitutionality* of the two acts of the Legislature of Pennsylvania, dated respectively March 4, 1865, and February 26, 1869. (Printed Record, Case No. 55, p. 7, &c.; Ib., p. 11, &c.)

By the first of these acts the two neighboring colleges of Washington, located at Washington, Washington county, Pennsylvania; and of Jefferson, located at Cannonsburg, in the same county and State, and only seven miles distant from each other, were first united, by common consent, as one college or corporation, *with double sites*—the sites of the two old colleges being retained for certain purposes of administration.

By the second act a more perfect union was formed, with like consent, legally expressed, under an amended constitution, whereby they were consolidated, *with a single site*, at the town of Washington, Pennsylvania.

The history of the union of these two colleges has an instructive illustration, on a larger scale, in the history of the formation of our great American Union. At first it was a kind of *divided union*, under "articles of confederation." Next, as the result of experience and of a common necessity, "a more perfect union" was formed. This parallel is complete throughout; for we find that the *local* passions and interests which opposed the adoption of the Constitution of the United States are here exhibited, on a smaller scale, in the cases now before the court.

All questions as to the *constitutionality* of these acts of the Legislature of Pennsylvania, under the constitution of that State, have been *finally* disposed of by the judgments rendered in these cases by the supreme court of that state.

It has *affirmed* their constitutionality, and that decision cannot be reviewed by this court, under the 25th section of the judiciary act. (Dartmouth College Case *v.* Woodward, 4 Wheaton R., pp. 625, 655; Gut *v.* The State, 9 Wallace U. S. R., pp. 35, 37; 10 *ib.*, 515.)

That decision disposes of the questions as to the right of the Legislature of Pennsylvania to alter the charters of Jefferson College, under the power reserved by the 5th section of the charter of 1802, (Printed Record, Case No. 55, p. 6,) and as to its right to alter the new charter of the consolidated college, passed March 4, 1865, by the act of February 26, 1869, under the power reserved by the 26th section of article 1 of the amended constitution of 1857.

The only question, then, to be considered here is as to the constitutionality of these acts under the Constitution of the United States. Are they constitutional when judged by that standard? Do they impair the obligation of contracts, in that sense and to that extent which is prohibited by that Constitution?

We shall consider these cases in their order.

Case No. 55. *The Trustees of Jefferson College, &c.* v. *Washington and Jefferson College.*

This case rests upon two assumptions: 1st. The *continued existence* of the old corporation of Jefferson College, at least for the purposes of this suit; and, 2d. The *continued existence of "a contract*, entered into between the two old colleges and between them severally and the United College," which contract the old corporation of Jefferson College has a standing in court to enforce against the new corporation and the State.

The conclusive answer to the first assumption is, that the old corporation of Jefferson College no longer exists. Its *dissolution* is expressly declared by the act of 1865, for every purpose of this kind. The 1st section of that act provides: "That the *colleges* of Jefferson, at Cannonsburg, *incorporated*, &c., and of Washington, at Washington, *incorporated*, &c., shall hereafter be *one corporation*, *in fact* and *in law*, under the name of Washington and Jefferson College;

which corporation, by said name, shall possess and enjoy *all* the capacities, powers, privileges, immunities, and franchises which *were* conferred upon and *held* by said colleges of Jefferson and Washington and the trustees thereof, with such enlargements and subject to such changes therein as are made by this act." (Printed Record, Case No. 55, pp. 7 and 8.)

Section 18 also provides: "That from and after the organization of *the corporation hereby created*, as herein provided, *the colleges of Jefferson and Washington*, named in the 1st section of this act, *shall be dissolved*, *except* so far as may be necessary to enable them to close up their business affairs, and to perfect the transfer of their property and rights to the corporation by this act created." (Ib., p. 11.) It is admitted that the new corporation was regularly organized under this new charter.

The "colleges" spoken of had *no existence*, except *as corporations*. In the 1st section, they are described as the *colleges* "*incorporated*," by their several charters. They are, therefore, declared to be *dissolved, as such corporations*. The new corporation could not exist without the previous extinction and dissolution of the old ones. The *co-existence* of the two old corporations and of the new corporation, at one and the same time, was impossible. They must cease to exist, before the new corporation could exist. The confusion of ideas on this subject, which appears to be entertained by the counsel on the other side, reminds one of those sage resolutions said to have been passed on the subject of the erection of a new jail: "Resolved 1st. That a new jail shall be erected on the site of the old one. Resolved 2d. That the new jail shall be built with the materials of the old jail. Resolved 3d. That the old jail shall continue to be occupied until the new jail is finished."

The *exception*, providing for the continued existence of the two colleges, is declared to be, "so far as may be found necessary to enable them to close up their *business* affairs, and *to perfect* the *transfer of their property and rights to the corporation by this act created*." For all *other* purposes, they are

declared to be *dissolved*, or *dead*. The exception made is *in aid* of their *dissolution;* in aid of the creation and more complete organization of the new being, in whose existence their prior individualities were merged and lost.

The "business affairs," here referred to, necessarily relate to the individual business transactions of each separate corporation, prior to their merger in the new corporation. The idea that they can refer to transactions arising *afterwards*, is as absurd as that a man can make a will and die, and *yet live afterwards to administer on his own estate, or to enforce the execution of the trusts of his will.* In Hamlet's soliloquy the question was: "To be, or not to be." Here it is reversed: "Not to be, and yet, to be."

The second assumption on which this case rests is equally erroneous, viz, the continued existence of the contract which formed the basis of the union and merger of the two old colleges under the new charter of 1865. It is no doubt true that, prior to the act of March 4, 1865, there was a contract or agreement as to the terms on which each of the colleges was willing to surrender its separate charter and become merged in the formation of a new corporation. But that contract was *executed*, and became *fulfilled and consummated* by the passage of that act, by the acceptance of it by the boards of trustees of the two old colleges, in the manner provided by it, and by the organization of the new corporation under it. The new corporation became their legal successor. When this was done, that previous contract, like the two old colleges, as such, ceased to be, or to have any other representative than the new corporation created by the new charter. Thenceforth the new corporation became a new and independent being, having no more legal relation or connexion with the two old colleges than if they had never existed. This is the legal effect of their merger in the new corporation.

If so, then it is idle to talk of a *continuing contract* between the two old colleges, or between each of them and the new college, which can be enforced by the late representatives of the *dead corporation* of Jefferson College.

The bill in this case was therefore properly dismissed for both these reasons.

(Case No. 56, *Francis I. Collier, et al.* v. *Washington and Jefferson College.*)

The reasoning of the counsel for the plaintiffs in error is substantially the same in this as in the previous case. The principal difference is in the *parties plaintiff*, who, in this case, are a minority of the new corporation created by the act of 1865; and, *in the contract*, whose obligation it is alleged has been violated by the supplementary act of 1869, locating both branches of the united college at Washington, Pennsylvania. In the former case, the contract alleged to be violated was the antecedent contract, which formed the basis of the act of 1865. In this case, the contract alleged to be violated is the act of 1865 itself.

It is admitted that all the college charters involved in these cases were *contracts* between the State on the one side, and the several corporations created by them on the other. Have they been impaired, so far as the parties in this case are concerned?

We have already seen that the old charter of Jefferson College was surrendered, and that that corporation itself was dissolved by the act of 1865, with the mutual consent of the State on the one side, and of that corporation on the other; that is, with the mutual consent of the only two legal parties to that contract.

In like manner, we have seen that the charter of the new corporation, called Washington and Jefferson College, was amended by the act of 1869, with the like consent of the State and of that corporation; that is, with the mutual consent of the only two legal parties to the contract; which consent was given by that corporation in the manner prescribed by that act; not by the vote of a mere majority, but by a vote of two-thirds of the members of the board of trustees.

The passage of the act of 1865, without the impairment of the original contracts contained in the charters of the two colleges before their union, (which fact, as admitted by

the plaintiffs, in this case,) involves the power to pass the act of 1869, without impairing the obligation of the contract contained in the charter of 1865: 1st, because the parties to the contracts were relatively the same in both cases—the State, on the one side, and the corporations to be affected, on the other; and 2d, because both the parties consented to the changes made. "*Volenti non fit injuria.*" Therefore, so far as these several contracts are concerned, and so far as the parties to this suit are concerned, there has been no impairment of the obligation of these contracts, and the bill in this case was also properly dismissed.

Case No. 57. *David C. Huston et al.* v. *Washington and Jefferson College.*

The bill in this case is brought by the holders of certain scholarship contracts, made in 1853, with Jefferson College, before the dissolution of that corporation, and before the creation of the new corporation known as Washington and Jefferson College. Its object is, *in effect*, to enforce the *specific performance of those contracts*, by an injunction, forbidding the consummation of the more perfect union of the two colleges, and the more efficient organization of the new corporation, by the establishment of a single site for its operations, at Washington, Pennsylvania, in pursuance of the amendment to the charter granted by the Legislature of Pennsylvania and accepted by the new corporation in 1869.

This amendment, it is alleged, impairs the obligation of these scholarship contracts, because, it is further alleged, they fix Cannonsburg as the place of their performance, which place thereby became an essential element of these contracts; and that this element of them is impaired or violated by this amendment, making Washington, Pennsylvania, the sole and single site of the new college.

As this is a proceeding in equity to prevent the consummation of an object long desired by the friends of education in Western Pennsylvania, and one deemed essential to the continued life and prosperity of Washington and Jefferson College, not only by the Legislature of Pennsyl-

vania, but by the trustees, who are the special guardians and administrators of that institution, it may be useful, before proceeding to the consideration of the constitutionality of the measure in question, to consider for a few moments—1st. The nature and character of the contracts sought to be specifically enforced. 2d. The number of the holders of these contracts really interested in the relief sought. 3d. The truth of the allegation that these contracts fix Cannonsburg as the only place of performance.

1. These contracts are *unconscionable*, and are themselves one of the leading causes of the necessity which finally compelled the legislation of which their holders now complain. In proof of this statement no other evidence is needed than the 3d section of the bill of complaint in this case. It is as follows:

"3. That, on or about the first day of January, 1853, the board of trustees of said college devised and put into operation a plan of endowment, whereby, on the payment of *twenty-five dollars*, the subscriber to the plan became entitled to *a single scholarship;* on the payment of *fifty dollars*, to *a family scholarship;* on the payment of *one hundred dollars*, to *tuition for thirty years;* that, by the payment *of four hundred dollars, a perpetual scholarship was endowed*, to be designated by whatever name the subscriber might select; and it was provided that such a scholarship might be disposed of by sale or devised by will as any other property; *that, by the payment of twelve hundred dollars*, the subscriber became *entitled to a scholarship in full, entitling the holder to the tuition, room-rent, and boarding of one student in perpetuity;* and it was provided that such a scholarship might be disposed of as any other property; *that upwards of fifteen hundred of these scholarships were sold and disposed of, whereof more than twelve hundred are still outstanding;* that to each of the subscribers to the said plan of endowment a certificate was issued, under the seal of the corporation, reciting the payment of the consideration money, the kind of scholarship to which the holder was entitled, prescribing the terms of transfer, and setting forth that the scholarship thereby granted was created in pursuance of 'the plan of endowment adopted by the trustees of Jefferson College, in Cannonsburg, in the county of Washington,' a copy whereof is hereby appended as an exhibit."

Think of it: these contracts have been in existence since 1853, nearly eighteen years, and more than twelve hundred of them are now outstanding. Four or five years of instruction, including that of the preparatory department, at a respectable college, for $25! A *family* scholarship, for an indefinite number of boys, for four or five years each, for $50!! A perpetual scholarship, for $400!!! A scholarship in full, entitling the holder to the tuition, room-rent, and boarding of one student in perpetuity, for $1,200!!!!

Is it any wonder that a college staggering under such a load should need legislative aid—first, consolidation, in the hope of finding the strength given by union; and, finally, permission to change its place of business. But this, it is alleged, is *unconstitutional!* These contracts must be fulfilled *at Cannonsburg*, and *not elsewhere*. Shylock must have his pound of flesh. These are the meritorious individuals who complain that the obligation of their contracts has been, or is about to be, *impaired* by the Legislature of Pennsylvania, and by the board of trustees, whose chief concern is to devise ways and means to keep the college *alive* anywhere.

2. But how many of these *patrons* of Jefferson College, are there who are *really interested* in having their contracts fulfilled *at Canonsburg*, and not elsewhere?

A student cannot live at home, and attend college *conveniently*, at a greater distance from home than two or three miles at most. If so, then it is evident that the whole number of scholarship holders, who have any *direct interest* in having the contracts fulfilled at Cannonsburg, and not elsewhere, must be those residing in the town of Cannonsburg, and those in its immediate vicinity—within a circle whose radius does not exceed two or three miles at most. As to all holders of scholarships residing beyond that circle, their sons could not board at home, and attend the college for tuition there. They would be obliged to leave home, and board at the place where the college was located. If so, then it is clear that, as to all the holders of scholarships, except the small number residing in Cannonsburg, and

within a circle of three miles from Cannonsburg, it must be a matter of indifference whether they board and attend college at Cannonsburg or at Washington. Thus the number of those really interested in the performance of these contracts at Cannonsburg, and not elsewhere, is reduced from twelve hundred to a few residents of the little country town of Cannonsburg, and to their neighbors within three miles.

3. But the more important question is, do these contracts really fix *Canonsburg* as the *only place* for their performance? They do not. The contracts are silent on the subject, and fix neither *time* nor *place* for their performance. What seems, at first sight, to fix Cannonsburg as *the place, is only a part of the descriptive name* of the original corporation of Jefferson College. Its corporate name is, "The Trustees of Jefferson College in Cannonsburg, in the county of Washington." (See Charter of 1802, sec. 2, Printed Record in this case, p. 5.) And that corporate name was necessarily used by the trustees in making these contracts. (See Printed Record, p. 3.) The contract being silent on the subject of the place of performance, it is indicated in no other way than by *the location of the college for the time being.* "*These contracts,*" as is stated by Ch. J. Thompson, "*are personal to the corporation,* and it could perform or offer performance anywhere, whether at Washington or Cannonsburg." (Printed Record, p. 30, fol. 55.)

The law on this subject is thus stated in 2 Parsons on Contracts, 5th edit., p. 649, in the notes:

"A note payable *in specific articles,* without mentioning *time* or *place,* is payable only on demand, and should be demanded *at the place where the property is.* (Lobdell *v.* Hopkins, 5 Cowen R., 518; Vance *v.* Bloomer, 20 Wend., 196.) In Rice *v.* Churchill, (2 Denio, 145,) *a note was given by the owner of a saw-mill, payable in lumber when called for.* It was held to be *payable at the maker's mill,* and that a special demand there was necessary to fix the maker, unless he had waived the necessity.

"So also in Bronson *v.* Gleason, (7 Barb., 472,) *the general rule was admitted,* that *the store of the merchant, the shop*

of the mechanic or manufacturer, and the farm or granary of the farmer, is the place of delivery, when the contract is silent on the subject; but this rule was held to be inapplicable when the collateral circumstances indicated a different place."

It was never supposed that such contracts would prevent their makers from changing their places of business.

If the owner of the saw-mill should move from one saw-mill to another, or if the merchant, the mechanic, the manufacturer, or the farmer, should change their places of business, after giving their notes, silent as to the place of performance, but payable in the specific articles of their business, their contracts would follow them. It will not be pretended that they could refuse performance at their new places of business, because they were to be performed at their original places of business, and not elsewhere.

These contracts of Jefferson College for tuition are of the same nature. They follow it, wherever it goes, by authority of law. To illustrate this point, let us suppose the facts of the present case to be reversed; that the site of Jefferson College had been legally and validly changed from Cannonsburg to Washington; and that the performance of these scholarship contracts had been demanded there: could that college refuse performance on the ground that the contracts stipulated for performance *at Cannonsburg*, and not elsewhere? No one will so contend. If so, then that fact shows conclusively that the pretense now set up by the complainants in this case, that these contracts of Jefferson College stipulate for their performance at Cannonsburg, and not elsewhere, is without legal foundation. The obligation of the contracts must be reciprocal, and equally binding upon both the parties to them. Both parties must be bound to the fulfillment of the contracts at Cannonsburg, and not elsewhere, or neither of them is so bound.

If such is a correct interpretation of the legal effect of these contracts, then no constitutional question can arise in this case, *because there is no such contract as is alleged, to be impaired by the laws in question.*

But for the purpose of meeting the question as to the *constitutionality* of the acts of 1865 and of 1869, let it be granted, for the sake of the argument, that these scholarship contracts *do* stipulate for their performance at Cannonsburg, and not elsewhere. Then we have the case of two sets of conflicting contracts, one set of which is *primary* and *paramount*, viz, the charter contracts between the State and the Colleges of Jefferson, and of Washington and Jefferson College; and the other set of which is *secondary* and *subordinate*, viz: first, the scholarship contracts of Jefferson College, stipulating for their performance at Cannonsburg, and not elsewhere; and, second, the contract of Washington and Jefferson College, assuming the performance of those contracts, under the charter of 1865, partly at Cannonsburg and partly at Washington. If the *primary* and *paramount contracts*, and the rights legally exercised under them, impair the obligation of the *secondary and subordinate dependent and collateral contracts*, then the question arises, whether this impairment is such an impairment of the obligation of contracts as is forbidden by the Constitution of the United States.

We contend that it is not; that it is "*damnum absque injuria*," because it is the consequence of the exercise of antecedent and paramount legal rights: and because these *secondary* contracts were made in subordination to the *primary*.

The State of Pennsylvania, in the charter of Jefferson College, granted in 1802, reserved the right to alter it, as we contend, *without* the consent of that college, and *a fortiori*, with its consent. During the continuance of that charter, viz, in 1853, these scholarship contracts were entered into, stipulating, according to the assumed basis of this argument, for their performance at Cannonsburg, and not elsewhere. In 1865 the State, in the exercise of its general authority, and of the reserved power of alteration contained in its charter, accepted the surrender of that charter, and provided for the performance of the scholarship contracts by the new corporation of Washington and

Jefferson, partly at Washington and partly at Cannonsburg. This provision varied the place of the performance of these contracts, (according to the hypothesis of this argument,) but it did not "impair their obligation" in the legal sense which is forbidden by the Constitution of the United States. *This was merely the exercise of a paramount legal right, reserved in the beginning;* and in contemplation of law, the exercise of a legal right can do no injury to any one. If the rights secured by the scholarship contracts were thereby rendered less valuable, or their enjoyment less convenient or desirable to a few, it was a consequence for which the law can furnish no remedy.

This consequence grows out of the fact, that the scholarship contracts were made with a subordinate power, which by the law of its being was subject to the control of a superior power. For the same reason the trustees of Jefferson College could not stipulate for the *permanent* location of the college at Cannonsburg, except subject to the right of the State to remove it elsewhere, either with or without its consent.

So also in regard to the act of 1869, locating the whole new college at Washington.

The amended constitution of Pennsylvania, (art. 1, sec. 26,) adopted in 1857, expressly provides, that "the Legislature shall have power to *alter, revoke, or annul any charter of incorporation hereafter conferred by or under any special or general law*, whenever, in their opinion, it may be injurious to the citizens of the Commonwealth; in such manner, however, that no injustice shall be done to the *corporators*."

The charter of 1865, and the amendment of that charter made by the act of 1869, were, therefore, both made after the adoption of the above amendment to the constitution of Pennsylvania, and were subject to its operation; and subject, of course, to the same legal consequences to the scholarship contracts before stated, under the power to alter the original charter of 1802.

It is argued that this power can only be exercised by the Legislature when accompanied by a *declaration* that, "in its

opinion, it would be injurious to the citizens of the Commonwealth," for the previous condition of the charter to remain unchanged. But this is not required by the terms of the amendment. The power is given, when the "opinion" exists. The action of the legislature in altering a charter, &c., is as good evidence of its "opinion" on the subject, as an express declaration to that effect.

The power given is universal, saving only the proviso, "that no injustice shall be done to the *corporators*." The holders of these scholarship contracts are not "corporators;" and, therefore, they cannot claim the benefit of this proviso.

But, independently of this result of the power reserved by the State to alter the charter of these corporations, the same consequence follows from more general principles.

There are two classes of contracts involved—one class made by the colleges with the State; and another class, made by the colleges with the holders of the scholarships. The first class may be called *the charter contracts;* the second class may be called *the scholarship contracts.*

In relation to the *charter contracts*, the State occupies the double relation of *contractor* and of *law-maker;* because all its action in relation to its contracts necessarily assumes the form of *law*. Now, it is an established principle, that the parties who have made a contract can unmake it—can modify, change, or dissolve it, according to their pleasure. The only limitation upon this power is, that it shall be fairly and honestly exercised, and without any intention to injure or defraud others. In this respect, the state and those who contract with it occupy the same position as all other contracting parties. Now, it is admitted, or at least it cannot be denied, that in regard to the changes which have been made in these charter contracts the state and the officers of these colleges have acted honestly and fairly, and with a view to the best interests of those institutions and of the public. All the direct parties to these contracts have consented to their modification, and that consent has assumed the form of the laws in question. They are laws

in form, but they are *new contracts* in fact, and were honestly made by both the parties to the former contracts, with a view to the best interests of the parties directly concerned.

But it is objected by the holders of the scholarship contracts—

1. That the trustees of the colleges concerned could not legally consent to the changes made; that in the case of eleemosynary corporations *no changes* can be made in their *original* constitution, even with the joint consent of their trustees, and of the state, and with a view to the more efficient administration of their trusts.

If this doctrine be true, then the police power of the state, and the power of *cy-pres*, another form of it, as exercised both by courts of chancery and the legislatures of the States, are completely overthrown.

But the Dartmouth College case gives no sanction to such a doctrine. On the contrary, the whole point of that case is, that no change could be made by the State (in the absence of a reserved power) *without the consent of the trustees of the college*—the legitimate guardians of the trust. The changes made by the Legislature of New Hampshire in that case were made *without* and *against the consent of the trustees of that college;* and for that reason, and no other, they were pronounced by this court to be illegal and unconstitutional. It is reiterated, again and again, in the opinions of the judges in that case, that changes, however beneficial in the abstract, *cannot be made without the consent of the trustees.* Of course, the inference is clear and irresistible, that they *can* be made *with such consent.*

The case *of The State ex rel. Pittman* vs. *Adams et al.*, (44 Missouri Rep., 570, &c.,) is cited by the counsel for the plaintiffs in error in this case in support of this doctrine. But when the case is carefully examined, it will be found that *the decision turns upon an entirely different point*, viz: that the trustees of a college, even with the sanction of the State, cannot consent to an amendment of the charter of a college, the effect of which is fundamentally to change the objects, purposes, and administration of the trust. On the

contrary, the power of the trustees to consent to changes in aid of the execution of the original objects of the trust, and within the scope of their powers, as defined by their charter, is expressly admitted by the court in that case.

This will be evident from a statement of that case, and by extracts from the opinion of the court.

The charter of St. Charles College had expressly made it *unsectarian* in its character. (Ib., pp. 574–577.) An amendment to the charter, made by the legislature, with the consent of the corporation, had placed it under *ecclesiastical influence*, by providing that the concurrence of the Missouri Annual Conference of the Methodist Episcopal Church South should be requisite in filling all vacancies in the board, upon the conference affording to the board satisfactory assurances for the maintenance and endowment of the college. (Ib., p. 574.)

This amendment was objected to, and the authority of the legislature and of the board of trustees to make *such an essential change* in the objects and management of the institution was called in question. This, the court held, they had no power to do, (Ib., p. 583.) because "the amendment had not become necessary to further the objects of the charity."

But the court in this case does not deny the power of the legislature to make, or of the board of trustees to consent to, any changes in the original constitution of a college or other eleemosynary institution. On the contrary, the court says:

"The naked question then arises, whether the curators or trustees of an eleemosynary corporation can validate, by petition or subsequent acceptance, any *substantial change* by the legislature in the provisions of its charter.

"The result of the solution of this question is not without apparent inconveniences, whichever view is held. On the one hand, if this power of change be denied, the objects of a charity, it may be said, might become obsolete, or its legitimate ends be crippled by inconvenient provisions, that would embarrass its operations, and this limitation of power might destroy, instead of carrying into effect, the

will of the founder. *But it is not necessary to hold all changes to be absolutely prohibited;* for it is easy to imagine such altered conditions of society and of pursuits, that a strict adherence to all the formal requirements of a foundation might defeat its object; as, for instance, if in centuries past the founder of a college had enumerated alchemy and astrology among its studies, the study of chemistry and astronomy might be deemed a truer compliance with the object of the charity; for it should be presumed that he desired the pursuit of the substance rather than the shadow, even though he had been able to see only the shadow. *So, other changes may be found necessary in furtherance of the objects of the charity, which visitors should have authority to make or assent to, if they require an amendment to the charter.*

"But, on the other hand, if the general power of consent is lodged in the directors or curators, there is no security whatever in elemosynary grants," &c. (Ibid, pp. 580, 581.)

The result of the discussion of this view of the subject is thus stated:

"The curators, then, having no power over the charter, but it being, on the other hand, their creator, and their absolute rule of conduct, and the beneficial interest in the fund belonging neither to them nor to the State, but to the beneficiaries only, who, from the nature of the case, cannot consent, I infer that the *essential conditions* of the charter are *permanent, so far as change depends upon consent.* (Ibid., p. 582.)

"We must, then, hold that this alleged acceptance of the amendment of 1847 to the charter of St. Charles College gave it no validity; *that the amendment had not become necessary to further the objects of the charity*, but its direct tendency was to *change the principles* of its administration; and that, in consenting to it, the board of curators went beyond their powers." (Ibid., p. 583.)

In the cases now before the court, it is not pretended that there has been any fundamental change in the management, or in the objects and purposes of the trusts in these cases. The power of the trustees to consent to so unimportant a change as the removal of the site of a college to a point only seven miles distant, and within the same county and State, with the sanction of the Legislature of the State, must therefore be conceded.

2. It is also objected by the holders of the scholarship contracts, that the effect of the exercise of these legal rights of change by the parties to the charter contracts is to impair the obligation of their scholarship contracts.

But the injury to the holders of the scholarship contracts, whatever it may be, resulting from the consolidation of the two colleges at Washington, is *not direct* and *immediate*. On the contrary, it is only *indirect* and *consequential*. The legislation in question operates *directly* upon the *charter contracts*, and only *indirectly* and consequentially upon the scholarship contracts, in the exercise of at least *equal* rights.

Standing upon no higher ground than the parties to the charter contracts, the holders of the scholarship contracts object to the exercise by the parties to the charter contracts of their legal rights in reference to them, because the effect of such exercise may be injurious to them, and because the obligation of their contracts may be thereby impaired. But this is an unwarrantable assumption.

The general law on this subject is clearly stated in Cooley's Constitutional Limitations, p. 384, top paging:

"It is a general rule, that no one has a vested right to be protected against *consequential injuries arising from a proper exercise of rights by others*. This rule is peculiarly applicable to injuries resulting from the exercise of *public powers*. Under the police power the State sometimes destroys, for the time being, and perhaps permanently, the value to the owner of his property, without affording him any redress. The construction of a new way, or the discontinuance of an old one, may very seriously affect the value of adjacent property; *the removal of a county or State capital will often reduce very largely the value of all the real estate of the place from whence it was removed;* but in neither case can the parties, whose interests would be injuriously affected, *enjoin the act or claim compensation from the public.* * * * But, indeed, it seems idle to specify instances, inasmuch as *all changes in the laws of the State are liable to inflict incidental injury upon individuals;* and if every citizen was entitled to remuneration for such injury, the most beneficial and necessary changes in the law might be found impracticable of accomplishment." See also *ib.*, p. 395, top paging, note 1, near the end.

3. But in this aspect of the case, the final and conclusive answer to all these objections is, that the legislation in question, so far as it affects the scholarship contracts, is a legitimate exercise by the State, in its character of sovereign, or as *parens patriæ*, of a general remedial and police power, which does not impair the obligation of contracts. For examples and illustrations of the exercise of these powers in analogous cases, see Cooley's Const. Lim., pp. 97–103, 385, 573, 574, 577, 585, 594, 595, 596, 597.

Now, in dealing with this legislation in this remedial aspect, we must look beyond *forms*, to the *substance* of things.

These contracts are in reality *debts*, due originally by Jefferson College, and subsequently due by Washington and Jefferson College, after their payment had been assumed by that institution. The relations of the two parties to this class of contracts is therefore simply that of debtor and creditor.

But Jefferson College, the original debtor, by the admitted facts of the case, became embarrassed by the load of these very debts, and it asked permission from the Legislature to make a new arrangement, which was, in effect, an assignment for the benefit of its creditors. This permission was granted by the act of 1865, as the best thing which could be done under the circumstances for all parties. By that act Jefferson College was dissolved, and the payment of its debts was assumed by a new corporation thereby created, those debts being made payable partly at Washington and partly at Cannonsburg. To this arrangement no objection was made by the holders of these scholarship contracts. But this new institution, after struggling in vain for a period of three years, in its turn also became embarrassed, and was obliged to ask for legislative relief, in the form of permission to concentrate its means at one place (at Washington, Cannonsburg, or elsewhere, as might be thought best,) in the hope of being thereby enabled to pay the debts of Jefferson College, which it had assumed.

By the act of 1869 this permission was granted by the Legislature. This is the substance of what was done.

But the holders of scholarships in and around Canonsburg object to this new arrangement, because it is *less convenient* for them; because the removal of Canonsburg branch of the new college to Washington will injuriously affect the literal and full execution of their scholarship contracts, according to their interpretation of them; and because that removal impairs the obligation of their contracts.

Now, a distinction is to be observed between the *obligation* of a contract, and its literal *fulfilment* or execution: in other words, between the legal *obligation* of a debt, and its *payment*, literally and in full, according to the terms of the contract. In this case, the obligation of these debts has been fully acknowledged and carefully preserved. By the law of corporations, upon the dissolution of a corporation, debts due to or from it, (in the absence of some statutory provisions to preserve them,) become extinguished. (For numerous authorities on this point, see Abbott's Digest of the Law of Corporations, p. 296, §§ 62, 63.) But by the acts of 1865 and 1869, it is expressly provided, that "all the several liabilities of said two colleges, or corporations, by either of them suffered or created, *including the scholarships heretofore granted by, and now obligatory upon each of them, are hereby imposed upon and declared to be assumed by the corporation hereby created, which shall discharge and perform the same without diminution or abatement.*" (Act of 1865, §2.)

Thus the *obligation* of these contracts was strictly preserved. But, by the first arrangement, the payment of these debts was provided for in full, partly at Washington and partly at Cannonsburg. This, however, being found impracticable, after an honest experiment of three years, by a new arrangement, they were made payable wholly at Washington.

Now, what is the *substance* of the objection specially made by the holders of these scholarship contracts, residing in and around Cannonsburg? Nothing more nor less than

this: that their debts will not be paid literally and in full, when their debtor is found not to be able to pay literally and in full. No discrimination has been made against them. They have been put upon the same footing as all other creditors; but they are not willing to accept a percentage on the dollar. They insist upon being paid in full, when their debtor is not able to pay in that way, doing equal justice to all other creditors.

But, according to the distinction before noted, it is well-established law, that a failure to pay a debt in full or precisely as agreed, arising out of the inability of the debtor, is not an impairment of the *obligation* of a contract in the constitutional sense. Such cases are happening every day, without giving rise to constitutional questions. As, for example, in cases of the death, insolvency, or bankruptcy of individuals. So, also, it is held constantly by courts of equity, that *time* and *place* are not of the essence of contracts; that a failure to perform them literally at the *time* and *place* appointed, do not impair the *obligation* of contracts.

Every one of these cases is attended with more or less inconvenience, loss, and additional expense to the creditor. This may happen under an administration, after the death of the debtor, under a voluntary assignment made by him during life; or by his involuntary bankruptcy or insolvency, or by the appointment of a receiver by authority of law. In each of these cases the creditor, instead of receiving the whole of his debt, may receive only a percentage, greater or less, according to circumstances. The injury in such cases is *consequential*, resulting not from the administration, the assignment, or the receivership appointed by law, but from the antecedent condition of the affairs of the debtor, which rendered such measures necessary.

The action and interposition of the State in the affairs of these corporations by the laws in question was of the same remedial nature. Being special cases, in the affairs of corporations—the mere creatures of law—they required a special remedy. The action of the State in these cases has been *remedial* throughout; and with a view to the

best possible administration of the affairs of these corporations, and to the discharge of all their obligations, as far as might be possible. The injury complained of by the plaintiffs in error, if any, results, not from the final union of the two colleges at Washington by the arbitrary action of the State, but from their crippled and embarrassed condition, which rendered that union a necessity, or at least a wise expedient, to prevent a total loss, and save something out of the wreck for the public and for their creditors. The fallacy in the argument on the other side consists in attributing to the laws in question results, arising, not from them, but from the previous facts in the condition of these corporations. These laws accepted the facts of their situation and condition as they found them, and endeavored to devise the best possible remedy for both debtors and creditors.

A substantial remedy for the enforcement of these contracts against the new college has therefore been provided by the legislation in question. If so, then the obligation of these contracts, in the constitutional sense, has not been impaired. (Cooley's Const. Lim., pp. 285–288.)

A law changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offense was committed, or the indictment found, is not an *ex post facto* law, though passed subsequently to the commission of the offense or the finding of the indictment. (Gut *v.* The State, 9 Wallace U. S. R., pp. 37, 38.)

If these views of the force and effect of the legislation in question are correct, then it follows, that it does not impair the obligation of the scholarship contracts; and that the judgment of the court below, dismissing the bill of the complainants in this case, should be affirmed.

1. Because the scholarship contracts do not legally fix Cannonsburg as the only place for their performance.

2. Because, admitting that they do, the legislation in question is the legitimate exercise, by the State of Pennsylvania, of prior and paramount legal rights, reserved by

the charter of Jefferson College, and by the amended constitution of 1857.

3. Because it does not operate *directly* and *immediately* upon the scholarship contracts, but only indirectly and consequentially, by the parties to the charter contracts, in the exercise of rights at least equal to those of the holders of the scholarship contracts.

4. Because it is *remedial* in its character, tending rather to preserve and enforce than to impair or destroy the obligation of the scholarship contracts.

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